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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

BRUCE DUANE NELSON,

Defendant and Appellant.

2d Crim. No. B210115  
(Super. Ct. No. 1240603)  
(Santa Barbara County)

Bruce Duane Nelson appeals his conviction, by jury, of three counts of lewd acts on a dependent adult without the use of force or violence. (Pen. Code, § 288, subd. (c)(2).)<sup>1</sup> Appellant pleaded no contest to four additional counts of the same offense after the jury was unable to reach a verdict as to those counts. At sentencing, the trial court imposed the upper term of three years on the principal count and additional consecutive terms of eight months (one third the midterm) for each of the remaining counts, for a total term in state prison of seven years. Appellant contends the trial court erred in instructing the jury in terms of CALCRIM 331 concerning the credibility of a

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated. The offenses of which appellant was convicted are lesser included offenses of the charged offenses, lewd acts on a dependent adult, committed by means of force, violence, duress, menace or fear of immediate bodily injury. (§ 288, subd. (b)(2).)

witness with a cognitive impairment, and in imposing the upper term on the principal count. We affirm.

### *Facts*

Appellant worked as an aide at Solutions, a small rehabilitation facility for patients with traumatic brain injuries. Appellant worked the overnight shift and was the only staff member at the facility during those hours. His duties included checking on patients during the night, waking them up in the morning, helping them to use the toilet when needed, distributing medication and preparing meals. His convictions arise out of sexual contact with two female patients, Maggie and Anna (referred to in the information as "Jane Doe 1" and "Jane Doe 2," respectively). Both women had a history of depression. Each suffered a brain injury after overdosing on drugs during a suicide attempt.

### *Anna*

Anna, a 44 year old woman, was an overnight patient at the facility from February 19, 2007 through March 23, 2007. In addition to her brain injury, Anna suffers from Type I diabetes, depression and anxiety. She has difficulty concentrating, sitting still, and attending to tasks. Anna has poor judgment, acts impulsively and can become aggressive, even violent, when agitated. Her brain injury has also impaired her memory and her ability to understand events occurring around her.

On two separate occasions during Anna's stay, appellant entered her room, fondled her, exposed himself and told Anna to touch or to kiss his penis. When Anna told appellant to leave, he did. Anna testified that both times, appellant "unzipped" his pants to expose himself. There was evidence that appellant only wore sweat pants or shorts with an elastic waist band, rather than pants with a zipper.

Appellant's employer learned of his sexual contact with Anna in April 2007, when her parents called the facility to report that appellant had been "bothering"

their daughter by calling her and taking her out.<sup>2</sup> When confronted by the director, appellant agreed to have no further contact with Anna. On June 25, 2007, Anna told the director about the sexual contact that occurred at the facility. The director placed appellant on administrative leave.

*Maggie*

Maggie, who was then 22 years old, was a resident at the facility from April 2, 2007 through July 6, 2007. As a result of her brain injury, Maggie cannot walk or use the toilet without assistance. She also has significant cognitive deficits, including a limited attention span, slow processing of information and an impaired short-term memory. Maggie's physical and mental impairments include having slow speech and a very soft speaking voice. She typically does not initiate speech but will give a one or two word answer to a direct question. It is common for Maggie to smile involuntarily and at inappropriate times, especially when she is feeling anxious or uncomfortable. Maggie's facial expression is otherwise generally flat. It is difficult for her to initiate movement or activity and she often "freezes," sometimes for several minutes, before regaining her ability to move. Although her internal emotional responses are similar to those of an unimpaired adult, Maggie cannot communicate feelings or emotions effectively.

Appellant had sexual contact with Maggie five times, consisting of kissing, fondling, digitally penetrating and orally copulating her and having her touch his penis. Maggie testified that she felt "gross" and "bad" about touching appellant. Appellant would leave Maggie's room when asked, although she would have to tell him more than once before he complied. Appellant told Maggie that she should not tell anyone about these incidents. She agreed because she was afraid of him.

Maggie first disclosed appellant's conduct on July 5, 2007, the day before her discharge from the facility. By that time, appellant was on administrative leave because of his inappropriate contact with Anna. When the director heard Maggie's story, she telephoned appellant and fired him.

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<sup>2</sup> Appellant had sex with Anna after she left the facility but was not charged with an offense relating to that conduct.

### *Jury Instructions*

The trial court provided the jury with pattern instructions on evaluating the credibility of witnesses (CALCRIM 226), relying on the testimony of a single witness (CALCRIM 301), evaluating conflicting evidence (CALCRIM 302), using a witness' prior statements as evidence (CALCRIM 318), and evaluating opinion testimony from expert and lay witnesses. (CALCRIM 332, 333.) In addition, it instructed the jury on evaluating the testimony of a person with a cognitive impairment using CALCRIM 331. This instruction states: "In evaluating the testimony of a person with a cognitive, or mental, or communication impairment, consider all of the factors surrounding that person's testimony, including her level of cognitive development. [¶] Even though a person with a cognitive, or mental, or communication impairment, may perform differently as a witness because of her level of cognitive development, that does not mean she is any more or less credible than another witness. [¶] You should not discount or distrust the testimony of a person with a cognitive, or mental, or communication impairment, solely because she has such an impairment."<sup>3</sup>

### *Discussion*

#### *CALCRIM 331*

Appellant contends that CALCRIM 331 lowers the prosecution's burden of proof by improperly bolstering the credibility of the complaining witnesses. This occurs, appellant contends, because the second sentence of the instruction suggests that the jury can disregard the factors listed in CALCRIM 226 and decline to evaluate the testimony of an impaired witness in the same way it would evaluate other witness testimony. Appellant objects that the third sentence of the instruction suggests the jury may not disregard or distrust aspects of a witness' testimony which might have been influenced or affected by her impairment. These arguments are without merit.

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<sup>3</sup> The text of CALCRIM 331 is taken directly from section 1127g which requires that the instruction be given, on request, "In any criminal trial or proceeding in which a person with a developmental disability, or cognitive, mental, or communication impairment testifies as a witness . . . ."

As appellant acknowledges, *People v. Catley* (2007) 148 Cal.App.4th 500, rejected a similar challenge to CALCRIM 331. There, the court concluded that the instruction does not bolster the testimony of a cognitively impaired witness because it expressly directs the jury to " 'consider all of the factors surrounding the person's testimony, including her level of cognitive development.' " (*Id.* at p. 507, fn. 1, quoting CALCRIM 331.) The instruction is balanced and neutral, informing the jury that it should not reject a witness' testimony based solely on a cognitive impairment, and at the same time that it should not consider such witness "any more or less credible" than any other witness. (*Catley, supra*, at pp. 507-508; CALCRIM 331.) The instruction thus invites the jury to do exactly what appellant claims it prohibits: to evaluate the witness' testimony by considering their impairments along with every other factor bearing on their credibility.

Nothing in CALCRIM 331 prevents a jury from considering whether a witness is unable to give accurate or honest testimony because of her cognitive impairment; in fact, the instruction requires the jury to consider that possibility, along with "all the factors surrounding that person's testimony . . . ." (*Catley, supra*, at pp. 507-508; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393 [approving similar jury instruction relating to the testimony of children].) Read in context with the trial court's other instructions on witness credibility (*People v. Holt* (1997) 15 Cal.4th 619, 677), CALCRIM 331 does not require the jury to accept the testimony of a cognitively impaired witness, nor does it require the jury to ignore the possibility that a witnesses was dishonest or inaccurate, either because of the impairment or for some unrelated reason. As a consequence, the trial court's instructions to the jury did not improperly bolster the witnesses' credibility or violate appellant's due process rights.

#### *Sentencing Error*

The trial court imposed the upper term of three years on count 1, which involved kissing Maggie on the mouth. A violation of section 288, subdivision (c)(2) occurs when a caretaker for a dependent person, willfully commits a "lewd or lascivious act" on the dependent person, "with the intent of arousing, appealing to or gratifying the

lust, passions or sexual desires" of himself or of the dependent person. (§§ 288, subd. (a), (c)(2).) To qualify as a "dependent person," the victim must be a person who has "a physical or mental impairment that substantially restricts his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities . . . ." (§ 288, subd. (f)(3).)

In imposing the upper term sentence, the trial court found, as a circumstance in aggravation, that "the crimes involved acts disclosing a high degree of callousness given the extent of the nature of the victims' brain injuries; the victims were particularly vulnerable given their limitations and residential care status; the defendant took advantage of a position of trust and confidence to commit the offense. [¶] It would be hard to imagine a more egregious breach of a position of power, trust and authority than was seen here. The victims were particularly vulnerable due to their significant disabilities."

Appellant contends the trial court improperly relied on elements of the offenses to justify imposing the upper term. This contention has been waived because appellant did not raise it when the trial court articulated its reasons for imposing the upper term. (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413-414; *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511-1512.)

Had it not been waived, we would reject the contention because the trial court did not abuse its sentencing discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) As respondent contends, Maggie qualified as a "dependent person," within the meaning of section 288, subdivision (f)(3), because she sustained a traumatic brain injury during a suicide attempt. The brain injury caused permanent physical, cognitive and psychological impairments that are more severe than the minimum level of disability necessary for Maggie to qualify as a "dependent person" under the statute. She was also more vulnerable than a minimally dependent person because her specific impairments made her unable to protect herself physically and unlikely to initiate reporting appellant's conduct to other staff. Because Maggie's impairments exceeded the minimum statutory threshold for dependency and vulnerability, the trial court properly relied on those factors

to impose the upper term sentence. (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562; *People v. Garcia* (1995) 32 Cal.App.4th 1756, 1776.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

COFFEE, J.

Frank J. Ochoa, Jr. , Judge  
Superior Court County of Santa Barbara

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Susan B. Gans-Smith, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A.  
Taryle, Supervising Deputy Attorney General, Nima Razfar, Deputy Attorney General,  
for Plaintiff and Respondent.